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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 346

JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Jeremiah D. Maguire and Ruth S. Maguire, submit this petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit, rendered March 5, 1940 (111 F. (2d) 843). A petition for rehearing herein was denied by the Court of Appeals on May 21, 1940 (R. 84). There are filed herewith a certified copy of the entire transcript of record in said cause and a brief in support of this petition.

Summary Statement of the Matter Involved.

The facts herein are not in dispute and have been stipulated (R. 14-30). They may be summarized as follows:

Gustavus F. Swift died on March 29, 1903, leaving nine children surviving him, one of whom died in 1911. Ann M. Swift, the widow of Gustavus F. Swift, died on May 19, 1922 (R. 32). Ruth Swift Maguire (hereinafter called the taxpayer) is one of the eight children of Gustavus F. Swift who were surviving on March 1, 1913, and also on March 29, 1923 (R. 15, 16).

Gustavus F. Swift, by his last will and testament, after devising and bequeathing to his widow certain real estate on which the family residence stood, together with all household furniture and other property used in connection with said residence, devised and bequeathed, generally and not specifically, to Louis F. Swift, Edward F. Swift and Edward Tilden, as executors and trustees, the residue of his estate. The will directed the executors and trustees to pay all debts, to make certain payments annually commencing with the date of the testator's decease and continuing until the final distribution of the estate, and, after payment of all debts of decedent, to make certain partial distributions to members of decedent's family and other relatives. By clause 8 of said will, said executors and trustees were further directed:

> "to make a final distribution of all the rest and residue of my estate among my wife and children, at any time in their judgment and discretion after the expiration of ten (10) years from and after the date of my decease, but not before, and in any event, not later than twenty (20) years thereafter, giving to my wife the one-third part thereof, the balance to be divided among my children, share and share alike, and should my wife not be living at the time of such distribution, then the same shall be divided equally among my children, share and share alike, the descendants of any deceased children in such distribution

to take the proportion of their deceased parent'' (R. 25, 26).

On December 11, 1905, the Probate Court of Cook County, Illinois, entered an order approving the final account of the executors of the Estate of Gustavus F. Swift, and directing that the executors turn over to themselves, as trustees, the remainder of the estate in their hands, which they did on that date (R. 16). On March 29, 1923, the personal property thus received by the testamentary trustees from the executors of the Estate of Gustavus F. Swift, together with other personal property purchased subsequently by the testamentary trustees, was distributed by them in kind to the eight children of said Gustavus F. Swift who were then surviving, including the taxpayer (R. 34, 35). This personal property consisted of shares of the capital stock of certain corporations and bills and accounts receivable. By agreement between the taxpayer and her co-beneficiaries, the testamentary trustees under the will of Gustavus F. Swift delivered all of said property to the trustees of two *inter vivos* trusts, Union Terminal Trust and Swift Family Realty Trust, which the taxpayer and her co-beneficiaries had created for the purpose of selling said properties and distributing the proceeds thereof to the taxpayer and her co-beneficiaries under the will of Gustavus F. Swift. The property was sold by the two trusts in 1929 and 1930 (R. 34, 35).

On March 13, 1933, the Commissioner of Internal Revenue asserted a deficiency in income tax of Petitioners for the calendar year 1930 in the amount of $71,429.62 (R. 8). In determining the amount of the deficiency, the Commissioner used, as the bases for computing gain on the sale of the personal property distributed by the testamentary trustees to the taxpayer as a residuary legatee under the will of her father, Gustavus F. Swift, (1) the

fair market value on December 11, 1905, or the March 1, 1913, value, whichever was greater, of such property as was received by the testamentary trustees from the executors of Gustavus F. Swift and (2) the cost of personal property purchased by the testamentary trustees and by them distributed to the taxpayer and her co-beneficiaries on March 29, 1923 (except that the March 1, 1913, value of property purchased before that date was said to control if it exceeded cost).

The Commissioner at the same time asserted a deficiency in income tax for the calendar year 1930, calculated upon the same bases, against each of the other seven surviving beneficiaries of the testamentary trust created by the will of Gustavus F. Swift. Petitioners and the seven other beneficiaries contested the asserted deficiencies before the United States Board of Tax Appeals, claiming that there had been no distribution to them under Section 113 (a)(5) of the 1928 Revenue Act until March 29, 1923, when they received the property here involved from the testamentary trustees (R. 14, 15).

On January 28, 1939, the Board of Tax Appeals rendered its memorandum findings of fact and opinion in the cases before it, known as *Jeremiah D. Maguire and Ruth S. Maguire, Petitioners* v. *Commissioner of Internal Revenue, Respondent*, B. T. A. Docket No. 72216, and of *Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Charles H. Swift, et al., Executors, Estate of Edward F. Swift, Deceased, Louis F. Swift, Jr., et al., Executors, Estate of Louis F. Swift, Deceased, Helen Swift Neilson*, and *George H. Swift, Petitioners* v. *Commissioner of Internal Revenue, Respondent*, B. T. A. Docket Nos. 90338 to 90344, both inclusive. On March 29, 1939, the Board of Tax Appeals made its decision in Petitioners' case, B. T. A. Docket No. 72216, holding that there was a deficiency in income tax of Petitioners for the calendar year 1930 in

the amount of $46,433.60, which is admitted by Petitioners to be correct (R. 31-47). A copy of the opinion of the Board of Tax Appeals is appended to the brief filed herewith.

In deciding this case, and related cases, the Board of Tax Appeals found that

> "the language of the statute above quoted, however, is clear and unambiguous. The basis laid down by the statute is 'the fair market value of the property at the time of the distribution to the taxpayer.' * * * The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923 * * *."
>
> "Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923" (R. 38, 39).

On June 21, 1939, Guy T. Helvering, Commissioner of Internal Revenue, Respondent, in B. T. A. Docket No. 72216, filed in the United States Circuit Court of Appeals for the Seventh Circuit under its No. 7049 his petition for review and assignments of error (R. 48-53). On July 7, 1939, the Court of Appeals, upon the joint motion of the Commissioner of Internal Revenue and the Respondents in each of the eight cases entered an order herein providing as follows:

> "5. In the event that application shall be made by either party to the Supreme Court of the United States for a writ of certiorari in the said case of *Guy T. Helvering, Commissioner of Internal Revenue, Petitioner on Review* v. *Jeremiah D. Maguire and Ruth S. Maguire, Respondents on Review,* then pending final disposal of said case by the Supreme Court no Order for Mandate or Mandate shall issue in any of the other seven cases, and upon final disposition of said case by the Supreme Court, an Order for Man-

date and Mandate similar to those which may be made and issued by this Court in the said Maguire case shall be made and issued by the Court in each of the said other cases" (R. 55, 56).

The principal issue in the Court of Appeals was the construction to be placed upon the words "at the time of the distribution to the taxpayer", as those words are used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928, in determining the proper basis for computing the gain to Petitioners from the sale of the personal property delivered to them on March 29, 1923 by the testamentary trustee and sold by the trustees of Union Terminal Trust in the calendar year 1930, and by the trustees of Swift Family Realty Trust in the calendar year 1929. Sixty per cent of the gain from the sale made in 1929 by the Swift Family Realty Trust is taxable in the calendar year 1930. Income taxes for the calendar year 1929 are not in dispute. Petitioners and Respondent have stipulated that the beneficiaries of the testamentary trust, Ruth Swift Maguire, Harold H. Swift, Gustavus F. Swift, Charles H. Swift, Edward F. Swift, Louis F. Swift, Helen Swift Neilson, and George H. Swift, are taxable as though the sales made were made by said beneficiaries individually (R. 19, 20, 21).

Petitioners and Respondent have stipulated the amount of taxable gain if the proper basis of all such personal property so sold is the fair market value thereof on March 29, 1923, when the property was delivered by the testamentary trustees to the beneficiaries of the trust, which Petitioners contend was "the time of the distribution to the taxpayer". They have also stipulated the amount of taxable gain if the proper bases were (1) as to property received by the testamentary trustees from the executors of Gustavus F. Swift, the fair market value thereof on December 11, 1905, or on March 1, 1913 whichever was greater; and (2) as to property purchased by the testamentary trustees, the cost thereof to them (except that

the March 1, 1913, value of property purchased before that date should control if it exceeded cost) (R. 19, 20, 21).

The decision of the Court of Appeals herein sustained the contentions of the Commissioner of Internal Revenue as to the bases for computing gain on the sale of the personal property involved herein, reversed the order of the Board of Tax Appeals, and remanded the cause for further proceedings not inconsistent with the views expressed in the opinion of the Court of Appeals (R. 68-75).

The Court of Appeals held that the phrase "time of distribution to the taxpayer", as used in § 113 (a) (5) of the 1928 Act means "time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater. § 113 (b)" (R. 73).

As to property purchased by the testamentary trustees and distributed to the taxpayers on March 29, 1923, the court concluded that such property was not property transmitted at death, that it was acquired by the taxpayer by purchase and not by will, and that as to it, the taxpayer's basis was the cost to the testamentary trustees or the March 1, 1913 value, whichever was greater (R. 74, 70). A copy of the opinion and decision of the Circuit Court of Appeals (Seventh Circuit) is appended to the brief filed herewith.

Petitioners have contended and now contend that the words "the time of the distribution to the taxpayer", as used in § 113 (a) (5) of the Revenue Act of 1928 (C. 852, 45 Stat. 818), as applied to the issues herein, mean the distribution on March 29, 1923, by the testamentary trustees to the taxpayer.

Respondent has contended that as to such personal property as was owned by the testator, Gustavus F. Swift,

at the time of his death in 1903, and which was sold by the taxpayer, the words "the time of the distribution to the taxpayer" mean the distribution on December 11, 1905, by the Executors of the Estate of Gustavus F. Swift, Deceased, to themselves as testamentary trustees and that as to such property the basis for determining taxpayer's gain from the sale thereof was its fair market value on that date or its March 1, 1913 value, whichever was greater. Respondent also contends that such personal property as was purchased by the testamentary trustees subsequent to December 11, 1905, and by them distributed on March 29, 1923, to the eight children of Gustavus F. Swift then surviving, including the taxpayer, was not "property transmitted at death", and that, therefore, the proper basis for determining taxpayer's gain from the sale thereof was its cost to such testamentary trustees, or its March 1, 1913, value if that value exceeded cost.

Statement of the Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

This Court's jurisdiction to issue the writ of certiorari herein prayed for is established by Section 240 of the Judicial Code, as amended (U. S. C. A. Title 28, Sec. 347), which reads in part as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

After providing for review in certain cases by writ of

error or appeal, the same section of the statute further provides:

> "No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this Section."

Section 8 of the Act of February 13, 1925 (U. S. C. A. Title 28, Sec. 350), provides in part as follows:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

The order denying petition for rehearing filed by Petitioners in the Court of Appeals, and the judgment herein, were entered on May 21, 1940 (R. 84), and this petition is filed within three months thereafter.

The Questions Presented.

The questions presented for decision in the case may be stated as follows:

Did the Court of Appeals err in holding:

(1) "that the phrase 'time of distribution to the taxpayer' as used in § 113 (a) (5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater. § 113 (b)"; (R. 73) and

(2) "that property purchased by the trustees is not 'property transmitted at death' * * * it was acquired by purchase and not 'by will'" (R. 74). "As to property purchased between 1905 and 1913, § 113 (b) applies: the basis is cost or 1913 value, whichever greater. As to property purchased between 1913 and 1923, § 113 (a) applies: the basis is cost. As to these properties, each is acquired by the taxpayer in the year the trustees purchased it, and the cost in each instance is the cost to the trustees in the year of purchase" (R. 70).

Reasons Relied Upon for the Allowance of a Writ.

The general reasons relied upon for the allowance of the writ herein are:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Circuit Courts of Appeal for the First and Second Circuits in the cases of *Commissioner of Internal Revenue* v. *Libbey,* 100 F. (2) 458 (C. C. A. 1st); *Commissioner of Internal Revenue* v. *Richard Van Nest Gambrill,* 112 F. (2) 530 (C. C. A. 2nd); *Commissioner of Internal Revenue* v. *Marjorie K. Campbell,* 112 F. (2) 530 (C. C. A. 2nd); *Commissioner of Internal Revenue* v. *Seymour H. Knox,* 112 F. (2) 530 (C. C. A. 2nd); *Commissioner of Internal Revenue* v. *Dorothy K. Rogers,* 112 F. (2) 530 (C. C. A. 2nd).

2. The Circuit Court of Appeals for the Seventh Circuit in the instant case has decided an important question of Federal law, which has not been, but should be, settled by this Court.

3. The Circuit Court of Appeals for the Seventh Circuit in the instant case has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

WHEREFORE, Petitioners pray that this petition for a writ of Certiorari, directed to the United States Circuit Court of Appeals for the Seventh Circuit, may be granted and that this Court proceed as is provided by law and the rules of this Court in such cases, and that, upon final hearing, the judgment of the Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1938

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JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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JEREMIAH D. MAGUIRE AND RUTH S. MAGUIRE,
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Respondent.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GENERAL STATEMENT.

The Petitioners herein apply for review of the decision of the United States Circuit Court of Appeals, Seventh Circuit, reported at 111 F. (2d) 843.

The grounds upon which the jurisdiction of this court is invoked are stated in the attached petition for a writ of certiorari.

The facts involved are set forth in the attached petition for certiorari under the heading "Summary Statement of the Matter Involved."

The principal contested issue is the construction to be given to the term "the time of the distribution to the taxpayer" as used in the third sentence of § 113 (a) (5) of the

Revenue Act of 1928, Chapter 852, 45 Stat. 791, 818, in determining the proper basis for computing the gain from the sale of personal property acquired by general bequest under the will of taxpayer's father, Gustavus F. Swift.

Petitioners have contended and here contend that the term "at the time of the distribution to the taxpayer" refers to the time of delivery of such property to the taxpayer, Ruth Swift Maguire, by the testamentary trustees under her father's will on March 29, 1923.

Respondent has contended that (1) as to such of said property distributed by the executors of the will of Gustavus F. Swift, deceased, to themselves as testamentary trustees on December 11, 1905, and by them delivered to the taxpayer, Ruth Swift Maguire, on March 29, 1923, the proper basis was the fair market value of such property on December 11, 1905, or on March 1, 1913, whichever was greater; and (2) that as to such of said property as was purchased by the testamentary trustees subsequent to December 11, 1905, and distributed to the taxpayer on March 29, 1923, the taxpayer's proper basis was the cost to the testamentary trustees or its March 1, 1913, value, if it exceeded the cost.

STATUTE.

Section 113 (a) (5), Section 113 (b) (1) and (2), and Section 701 (a) (1) * * * (13) of the Revenue Act of 1928 contain the applicable provisions of the statute. (Appendix, *infra.*)

ERRORS ASSIGNED.

THE ERRORS ASSIGNED AND URGED ARE:

(1) The decision of the Court of Appeals is erroneous in holding that the phrase "at the time of the distribution to the taxpayer" as used in § 113 (a) (5) of the Revenue Act of 1928 means time of distribution by the executors of the decedent's estate to themselves as testamentary trustees, on December 11, 1905, and that "the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, whichever was greater."

(2) The decision of the Court of Appeals is erroneous in holding that property purchased by testamentary trustees and by them distributed to the taxpayer, is property acquired by the taxpayer "by purchase" and not "by will", that such property was acquired by the taxpayer in the year the trustees purchased it, and that taxpayer's basis therefor is the cost to the trustees, or the value thereof on March 1, 1913, whichever is greater.

(3) Said decision is in conflict with decisions of United States Circuit Courts of Appeal for the First and Second Circuits, in the cases cited on page 10 of the Petition for Certiorari herein.

(4) Said decision is upon an important question of Federal law, which has not been, but should be, settled by this Court.

(5) Said decision is probably in conflict with applicable decisions of this Court.

SUMMARY OF ARGUMENT.

I.

The decision of the Court below is in conflict with decisions of the United States Circuit Courts of Appeal for the First and Second Circuits.

II.

The Court below erred in construing the applicable statute because the Court failed to recognize that the controlling words in the phrase "at the time of the distribution to the taxpayer" are the words "to the taxpayer."

III.

The words "distribution to the taxpayer," as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928 mean "delivery to the taxpayer."

IV.

The statute is clear and is not ambiguous.

V.

The legislative history relating to the enactment of § 113 of the Revenue Act of 1928 supports the position of the taxpayer.

VI.

The Court erred in concluding that "property purchased by the trustees and distributed to the taxpayer" was not "acquired by will."

ARGUMENT.

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEAL FOR THE FIRST AND SECOND CIRCUITS.

The specific questions here involved have been decided contrary to and in conflict with the decision of the Court below by the First Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Libbey*, 100 F. (2d) 458, and by the Second Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Richard Van Nest Gambrill*, 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Marjorie K. Campbell*, 112 F. (2d) 530; *Commissioner of Internal Revenue* v. *Seymour H. Knox*, 112 F. (2d) 530; and *Commissioner of Internal Revenue* v. *Dorothy K. Rogers*, 112 F. (2d) 530.

The *Gambrill* case, *supra*, involved the question of the basis for determining gain or loss under § 113 (a) (5) of the Revenue Act of 1928. The *Libbey, Campbell, Knox* and *Rogers* cases involved the question of the basis of determining gain or loss under § 113 (a) (5) of the Revenue Act of 1932, which was identical with § 113 (a) (5) of the Revenue Act of 1928. In each of these cases, the property sold was personal property received by general bequest from testamentary trustees, and in each case the Circuit Court of Appeals which rendered the decision held, in well reasoned opinions, that the term "at the time of the distribution to the taxpayer" as used in § 113 (a) (5) of the applicable Act refers to the time of delivery of such property to the taxpayer.

The decision of the Court below conflicts in principle

with that of the First Circuit Court of Appeals in *United States* v. *Van Nostrand*, 94 F. (2d) 510 (cited in the *Libbey* case, *supra*), with that of the Third Circuit Court of Appeals in *Haskell* v. *Commissioner*, 78 F. (2d) 869, and with that of the Sixth Circuit Court of Appeals in *Williamson* v. *Commissioner*, 100 F. (2d) 735, and *Taft, Trustee*, v. *Commissioner*, 101 F. (2d) 1007.

The Van Nostrand case decided that the term "distribution" as used in § 113 (a) (5) of the Revenue Act of 1928 refers to actual delivery to the taxpayer. The Haskell case involved the question of the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained by the taxpayer from the sale in 1930 of shares of stock acquired, as a legatee under a will, by general bequest. The *Williamson* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1932, of the amount of gain from the sale in 1932 and 1933 of certain stocks which taxpayer had acquired from the estate of her husband, who died intestate. The *Taft* case involved the determination, under § 113 (a) (5) of the Revenue Act of 1928, of the amount of loss sustained from the sale in 1930 of securities by a testamentary trustee to whom the residue of an estate was bequeathed. In all these decisions, the Courts held that the term "distribution to the taxpayer" meant "delivery to the taxpayer."

II.

THE COURT BELOW ERRED IN CONSTRUING THE APPLICABLE STATUTE BECAUSE THE COURT FAILED TO RECOGNIZE THAT THE CONTROLLING WORDS IN THE PHRASE "AT THE TIME OF THE DISTRIBUTION TO THE TAXPAYER" ARE THE WORDS "TO THE TAXPAYER".

The conclusion of the Court below that Congress was not looking beyond the "distribution by the estate" of Gustavus F. Swift, the taxpayer's father (R. 71), and "did not intend the valuation date to go beyond the time when the

estate was closed" (R. 73), ignores the controlling words of the statute "at the time of the distribution to the taxpayer" as used in the third sentence of § 113 (a) (5) of the Revenue Act of 1928.

The meaning of the words "at the time" need not be defined. The words "to the taxpayer" are clear, definite, certain and unambiguous. The property involved was personal property which the taxpayer acquired by general bequest under the will of her father, Gustavus F. Swift.

In applying the statute, the first fact to be determined is the identity of the "taxpayer." The statute (§ 701 (a) (13) of the 1928 Act) provides that:

> "The taxpayer is any 'person' subject to a tax imposed by this Act,"

whether that "person" be an individual, a trust, an estate, a partnership or a corporation.

Ruth Swift Maguire is the "person" in this case who is "subject to a tax imposed by this Act." She is the person "ultimately liable for the tax itself". *Colorado National Bank of Denver* v. *Bedford*, No. 719, decided April 22, 1940. The taxpayer's identity having been established, the plain language of the act eliminates from consideration any "time" except the "time" when the property was distributed to the taxpayer.

Haskell v. *Commissioner*, 78 F. (2d) 869, 870 (C. C. A. 3rd) (cert. den. 296 U. S. 652).

United States v. *Van Nostrand*, 94 F. (2d) 510, 512 (C. C. A. 1st).

Commissioner v. *Libbey*, 100 F. (2d) 458, 460, 461 (C. C. A. 1st).

Williamson v. *Commissioner*, 100 F. (2d) 735 (C. C. A. 6th) (cert. den. 307 U. S. 623).

Taft, Trustee, v. *Commissioner*, 101 F. (2d) 1007 (C. C. A. 6th).

Commissioner v. *Gambrill and Three Other Cases*, 112 F. (2d) 530 (C. C. A. 2nd).

III.

THE WORDS "DISTRIBUTION TO THE TAXPAYER" AS USED IN THE THIRD SENTENCE OF § 113 (a) (5) OF THE REVENUE ACT OF 1928 MEAN "DELIVERY TO THE TAXPAYER."

The word "distribution" was defined in *Willcuts* v. *Ordway* (C. C. A. 8th), 19 F. (2d) 917, 918, as

> "separation and segregation from the trust estate so that it no longer forms any part or parcel thereof."

The United States Supreme Court, in speaking of the meaning of the word "distribution," as applied to dividends, held that the "date of payment, not the date of the declaration of the dividend, is the date of distribution." *Mason* v. *Routzahn*, 275 U. S. 175. To the same effect is *Lewellyn* v. *Harbison*, 31 F. (2d) 740 (cert. den. 280 U. S. 560), in which the Circuit Court of Appeals (3rd Circuit) held:

> "A distribution made is a completed act. * * * We agree with the Circuit Court of Appeals for the Sixth Circuit that a 'distribution made' means 'dividends paid' and not merely declared."

In every instance where the word "distribute" or the word "distribution" was used in the Revenue Act of 1928, it had reference to actual payment or delivery. (See Sections 112, 113 (a) (9), 115, 161, 162, 165, 167 and 182 of the Revenue Act of 1928.)

The word "distribution" was likewise used in the sense of actual payment or delivery in the Revenue Acts of 1926, 1924, 1921, and 1918.

It clearly appears from the decision of the United States Supreme Court in *Brewster* v. *Gage*, 280 U. S. 327, that the word "distribution," as used in § 113 (a) (5) of the Revenue Act of 1928, means delivery to the taxpayer of personal property acquired by intestacy or by general bequest. In its opinion the Court referred to the right of a legatee of such property "to have it delivered upon

entry of the decree of distribution * * *. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees, and requires the administrators or executors to deliver it to them."

That the word "distribution," as used in the third sentence of Sec. 113 (a) (5) of the Revenue Act of 1928, means actual distribution to the taxpayer of property of the character described in said sentence also clearly appears from the decision of the Supreme Court in *McFeely* v. *Commissioner of Internal Revenue*, 296 U. S. 102 (with which five other cases[1] were decided).

The Commissioner contended in the *McFeely* case (and in each of the five other cases decided with it) that the words "the time of the distribution to the taxpayer," as used in Sec. 113 (a) (5) of the Revenue Act of 1928, meant the time of actual distribution to the taxpayer, and that until the date of such actual distribution, property could not be said to be held by the taxpayer under Sec. 101 of the Revenue Act of 1928. It was not disputed in the *McFeely* case that the words "at the time of the distribution to the taxpayer," as used in the third sentence of Sec. 113 (a) (5) of the 1928 Revenue Act, meant the date of actual distribution to the taxpayer.[2]

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1. *First Nat. Bank of Boston, et al., Trustees under Will of Blodgett* v. *United States*, 76 F. (2d) 200 (C. C. A. 1st).
Lee v. *Commissioner of Internal Revenue*, 76 F. (2d) 203 (C. C. A. 1st).
Dibblee v. *Commissioner of Internal Revenue*, 75 F. (2d) 617 (C. C. A. 9th).
Rand v. *Helvering, Commissioner of Internal Revenue*, 79 F. (2d) 24 (C. C. A. 8th).
Ogle v. *Helvering, Commissioner of Internal Revenue*, 77 F. (2d) 338 (C. C. A. 2nd).

2. In deciding the McFeely case the Supreme Court said:
"Here the rule obtains that a taxing statute, if of doubtful intent, should be construed favorably to the taxpayer. (Citing *Crooks* v. *Harrelson*, 282 U. S. 55, 61.)
"To depart from the literal meaning of § 101 (c) (8) would be to penalize the taxpayer by lengthening the period during which the capital asset must be held in what is really a single ownership to obtain the advantage of the reduced tax. Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

If, as held by the Court below, there was a distribution to the taxpayer, within the meaning of Sec. 113 (a) (5) of the Revenue Act of 1928, when the Swift estate was closed in the Probate Court on December 11, 1905, then, during the period from January 1, 1916, to March 29, 1923, Ruth Swift Maguire was the taxpayer liable for the tax on *all* income derived from the property held in trust for her under the will of her father. *Such was not the case.* The testamentary trustees, themselves, were the taxpayers as to income from such property during said period from January 1, 1916, to March 29, 1923, when actual distribution of the trust estate was made to Ruth Swift Maguire and her co-beneficiaries who were then surviving. During said period the revenue acts contained provisions expressly taxing to trustees income from any kind of property held in trust for future distribution under the terms of a will or trust.[3]

This being true, it could not also be true that "the time of the distribution to the taxpayer" of the properties involved herein was on December 11, 1905, when the estate of Gustavus F. Swift was closed in the Probate Court and such properties were thenceforth held in trust under the Swift will until they were delivered to the taxpayer and her sister and brothers.

IV.

THE STATUTE IS CLEAR AND IS NOT AMBIGUOUS.

The Court below, in order to reach its decision, was forced to find that the express language of the statute "is not unambiguous and definite." (R. 70.) In its opinion, the Court said:

"The term 'distribution' might refer to distribu-

3. Sec. 2(b) of the Revenue Act of 1916.
First Trust and Savings Bank v. *Smietanka, Collector* (C. C. A. 7th), 268 F. 230, 233.
Merchants Loan and Trust Co., Trustee v. *Smietanka*, 255 U. S. 509.

tion by the estate. *Jenkins* v. *Smith*, 21 F. Supp. 433; Dissenting opinion, *Commissioner* v. *Libbey*, 100 F. (2d) 458. If it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner*, 26 B. T. A. 896; *Libbey* case, *supra*. In the light of the conflict of thought on this point, we are not convinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe."

Such finding is contrary to and in direct conflict with every other authoritative construction of § 113 (a) (5) of the Revenue Act of 1928.

The First Circuit Court of Appeals, in the *Libbey* case, *supra*, said:

> "The meaning of the third clause of the statute is so plain that it does not call for construction."

The Second Circuit Court of Appeals, in the *Gambrill*, *Campbell*, *Knox* and *Rogers* cases, *supra*, said:

> "'It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'"

The Third Circuit Court of Appeals, in *Haskell* v. *Commissioner*, 78 F. (2d) 869, said (at page 870):

> "The language of the statute is clear and requires no construction."

The Sixth Circuit Court of Appeals, in *Williamson* v. *Commissioner*, 100 F. (2d) 735, expressed no doubt as to the clarity of the language used when it said (at page 738):

> "Its determination (34 B. T. A. 924) that the date of the actual receipt of the stocks is the basis instead of the date of the order of distribution is in accord with the words of § 113 (a) (5), which expressly states that the basis shall be the 'fair market value of the property at the time of the distribution to the taxpayer.'"

On the basis of its decision in the *Williamson* case, the Sixth Circuit Court affirmed the decision of the Board of Tax Appeals in *Taft* v. *Commissioner*, 101 F. (2) 1007.

The decision of the United States District Court in *Jenkins, et al.* v. *Smith, Collector*, 21 F. Supp. 433, is destroyed as a precedent by the decision of the United States Circuit Court of Appeals, Second Circuit, on June 10, 1940, in the *Gambrill, Campbell, Knox* and *Rogers* cases, *supra*. Upon the appeal of *Jenkins* v. *Smith*, *supra*, the sole issue submitted to the Circuit Court of Appeals for decision was that involving the service of notice and demand for tax by the Collector, such issue being referred to as Issue III in the opinion of the District Court. Inasmuch as the District Court decided that the plaintiffs, who were executors under the will of Jenkins, deceased, were entitled to recover the entire amount of the deficiency paid, for the reason that the Collector's demand and notice was not delivered to the taxpayers within ten days after receiving the assessment list, the remainder of the court's decision, holding that the term "distribution" in § 113 (a) (5) of the Revenue Act of 1932 referred to distribution by the executors and not a distribution by the testamentary trustees, is dictum.

The dissenting opinion in the *Libbey* case does not have the authority of a precedent.

As this Court declared in deciding *Old Colony Railway Company* v. *Commissioner*, 284 U. S. 552 (at 560):

> "The legislature must be presumed to use words in their known and ordinary signification. * * * The popular or received import of words furnishes the general rule for the interpretation of public laws. * * * As was said in *Lynch* v. *Alworth-Stevens Co.*, 267 U. S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and ingenuity and study of

an acute and powerful intellect would discover.' This rule is applied to taxing Acts."

This Court held in *United States* v. *Merriam,* 263 U. S. 179, 187:

> "In statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used."

Petitioner respectfully contends that the language of the applicable statute is so plain that there can be no doubt as to its meaning. The language of the statute is "so plain as to need no construction." *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, (at 89). The intention of Congress is to be sought for primarily in the language used. *Thompson* v. *United States,* 246 U. S. 547, 551. Where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. *Hamilton* v. *Rathbone,* 175 U. S. 414, 419.

The suggested ambiguity in the statute arises primarily through the failure of the Court below to give proper consideration and weight to the words "to the taxpayer," which are the vital part of the third sentence of § 113 (a) (5) of the Revenue Act of 1928 (Point II herein). When the phrase "distribution to the taxpayer" is considered as a whole, it is obvious that the "distribution" to which Congress referred was the delivery of the property involved to the person who sold it and to whom the gain on such sale was to be taxed.

V.

THE LEGISLATIVE HISTORY RELATING TO THE ENACTMENT OF § 113 OF THE REVENUE ACT OF 1928 SUPPORTS THE POSITION OF THE TAXPAYER.

The opinion of the Court below points out (R. 71) that the change in the basis date for determining gain or loss from the sale of property passing by will or intestacy as incorporated in § 113 of the Revenue Act of 1928 was due to confusion as to the meaning of the term "date of acquisition" of such property by the taxpayer, which basis was provided by the prior Revenue Acts. Such confusion was ended by the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327.

The Revenue Act of 1928, as adopted, followed the report of the Conference Committee (Report No. 1882, 70th Congress, First Session). That report adopted the Senate Finance Committee's Report No. 960 (70th Congress, First Session), which had revised Section 113 (a) (5) and certain related sections, so as to provide that "in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest, or by intestacy" the basis should be "the fair market value of the property at the time of the distribtuion to the taxpayer."

The Senate Finance Committee's Report No. 960 and the Conference Report No. 1882 state that the rule fixing the basis in the cases above enumerated as the fair market value of the property at the time of the distribution to the taxpayer "would also apply in cases where the executor purchases property and distributes it to the beneficiary." The various revenue acts, beginning with the 1916 act, treated executors and testamentary trustees as fiduciaries. Since Congress, when passing the Revenue Act of 1928, construed the third sentence of § 113

(a) (5) as applying to cases where the executor purchased property and distributed it to a beneficiary, it inevitably follows that Congress intended that the third sentence of said Section should also apply in cases where testamentary trustees purchased property and distributed it to a beneficiary.

The Court below decided, in effect, that in enacting Section 113 (a) (5) of the Revenue Act of 1928, Congress intended to tax the beneficiary of a testamentary trust upon all increment accruing to property held by testamentary trustees.

As a matter of fact, the reports of the Congressional Committee relating to the Revenue Bill of 1934 (House Report No. 704 and Senate Report No. 558, 73rd Congress (Second Session)) expressly state that under Section 113 (a) (5) of the Revenue Act of 1932 (which was identical with the same section of the 1928 Act), in the case of a general bequest of personal property, an executor, who is also named as testamentary trustee, might determine whether it would be most advantageous to sell as executor or as trustee. Thus it clearly appears that in enacting the 1928 Revenue Act and the 1932 Revenue Act, Congress did not intend to tax all increment in value of personal property not specifically bequeathed.

In recommending the re-enactment in 1934 of the provision contained in the 1926 Act, which fixed value at "the date of acquisition" as the basis, both the House and the Senate Committee said:

> "The change in the 1928 Act was made because there was some doubt as to the meaning of the term 'date of acquisition,' which was the term used in the Revenue Act of 1926";

and that since the 1928 Act was passed, the Supreme Court had defined "date of acquisition" to mean the date of death in the case of all property passing by bequest,

devise and inheritance, whether real or personal. The Committees then recommended that § 113 (a) (5) of the 1934 Bill should conform to the language contained in the 1926 Act, so that a uniform basis rule might be required in the case of property passing at death, whether real or personal.

It is seen that the change in the 1934 Act was not made because "some evils had crept in," as stated by the Court below (R. 72), but because all doubt as to the meaning of the words "date of acquisition" had been removed by the decision of the Supreme Court in *Brewster* v. *Gage*, 280 U. S. 327.

VI.

THE COURT ERRED IN CONCLUDING THAT "PROPERTY PURCHASED BY THE TRUSTEES AND DISTRIBUTED TO THE TAXPAYER" WAS NOT "ACQUIRED BY WILL".

The Commissioner argues and the Court below found that certain property purchased by the testamentary trustees and distributed to the taxpayer was not property "transmitted at death"; that therefore it was not property acquired by will, but was property acquired by purchase and the cost thereof to the testamentary trustees is taxpayer's basis (R. 74).

Petitioners submit that while such property may have been acquired by trustees by purchase, the taxpayer to whom such property was "delivered" acquired it under, by virtue of, and in accordance with, the terms and provisions of the will of taxpayer's father; that such property was "acquired" by will within the meaning of said Sec. 113 (a) (5); and that taxpayer's basis for determining gain is the fair market value of such property "at the time of the distribution to the taxpayer" on March 29, 1923.

The United States Board of Tax Appeals in its decision in the case of *Fleming* v. *Commissioner of Internal Revenue*, 36 B. T. A. 773 (at page 777) sustained the contention of the Commissioner of Internal Revenue that securities purchased by testamentary trustees and by them distributed to residuary legatees under a will was "property acquired by will". The Board said:

> "It may well be that these securities were purchased by the testamentary trust, and that the title to them was then acquired by petitioner, remainderman. (Citations) However, our immediately pertinent question is not *when* but *how* the petitioner, remainderman under the will of her father, not the trustee, acquired these securities. * * * the testamentary trustee was not the agent of petitioner, the remainderman. The trustee was the creature of the decedent, made so by his will. It was thus designated as the continuing instrumentality of the decedent to execute his and not the will of the petitioner, remainderman. She neither controlled the terms of the trust nor its *res* until distributed to her. All she had before that distribution was a right to share therein in accordance with the terms of the testamentary trust, the right to which vested in her at the death of decedent. (Citations) Thus, it was by virtue of the provisions of the testamentary trust created by the will of her father, that petitioner was the remainderman under that trust and received the securities in question. They may have been purchased by the trustee, but the petitioner acquired them by will."

In so deciding, the Board of Tax Appeals sustained the contention of the Commisisoner of Internal Revenue that the property purchased by the testamentary trustee was acquired by will.

In the case of *Commissioner* v. *Gambrill, supra,* the United States Circuit Court of Appeals (2nd Circuit) held (at page 533) that any property distributed by a testamentary trustee, which is part of the corpus of the trust, "is acquired through and by virtue of the will.

Through the will the remainderman derived all their interests and without it they would have had no standing and would have received nothing." The Court cited *Lyeth* v. *Hoey*, 305 U. S. 188, where the Supreme Court held that the value of property received by an heir from the estate of a decedent, in compromise of his claim that the decedent's will was invalid, was property acquired by inheritance within the meaning of the Federal income tax law.

The Court below placed undue emphasis upon the words "Property Transmitted at Death". The question is whether the property involved herein was "acquired by will." The words "Transmitted at Death" are merely a subheading of Sec. 113 (a) of the 1928 Act, relating to property acquired by will or by intestacy. As stated by the United States Supreme Court in *Caminetti* v. *United States*, 242 U. S. 470, 490:

> " * * * the name given to an act by way of designation or description or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.
>
> "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to, or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

CONCLUSION.

The property sold in 1929 and 1930 was distributed to the taxpayers on March 29, 1923, and the fair market value of the property on that date is the proper basis for determining gain on the sale thereof. The decision of the United States Circuit Court of Appeals (Seventh Circuit) should be reversed.

Respectfully submitted,

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APPENDIX.

APPLICABLE STATUTE.

Sec. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, which ever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913,

due regard shall be given to the fair market value of the assets of the corporation as of that date.

Sec. 701. *Definitions.*

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

UNITED STATES BOARD OF TAX APPEALS.

OPINION AND DECISION.

Although the Union Terminal Trust and the Swift Family Realty Trust returned as taxable income the capital gains realized by those trusts in 1930 the petitioners now admit that they are taxable upon the capital gains realized by the trusts in 1930 which is in accordance with the determination of the respondent. Each petitioner is, therefore, taxable upon one-eighth of the total capital gain realized by the trusts in 1930.

The only question presented to the Board for decision upon the main issue is whether the basis for computing the gain from the sale of the assets by the trusts is the fair market value of the assets on March 29, 1923, when the assets were distributed by the testamentary trustees to the beneficiaries, the taxpayers herein, as claimed by the petitioners, or the fair market value of the assets on December 11, 1905, when the assets were delivered by the executors to themselves as trustees, or the March 1, 1913, value of the assets, whichever is greater, as contended by the respondent.

Section 113 (a) (5) of the Revenue Act of 1928 reads as follows:

Basis For Determining Gain Or Loss.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent.

> In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

The property here in question consisting of shares of capital stock of corporations and notes and accounts receivable was personal property acquired by the taxpayers by a general devise, not by "specific bequest," under the will of their father and the basis prescribed by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The difference between the petitioners and the respondents is "the time of distribution" to the taxpayers of their interests in the residuary estate of their father.

The respondent points to the fact that during the period when the residuary estate of Gustavus F. Swift was held by the testamentary trustees from December 11, 1905, to March 29, 1923, there was an increase in the value of the trust assets and that the testamentary trustees acquired additional assets during that period. He argues that to the extent that there was an increase in the value of the residuary estate during the period that it was held by the testamentary trustees such increase in value entirely escapes income tax if the value at March 29, 1923, is used as the basis. He submits that this was not the intention of Congress when it incorporated into the Revenue Act of 1928 section 113 (a) (5).

The language of the statute above quoted, however, is clear and unambiguous. The basis laid down by the statute is "the fair market value of the property at the time of the distribution to the taxpayer." The respondent submits that the executors distributed the assets of the estate to the testamentary trustees on December 11, 1905, and that that distribution was the distribution referred to by the statute. The law says, however, "distribution to the tax-

payer." The testamentary trust was not the taxpayer. The taxpayers are the petitioners herein, or their decedents, to whom the assets were distributed by the testamentary trustees on March 29, 1923.

The question as to when the distribution of property takes place under facts similar to those here involved has been considered by the Board and the courts in a number of cases. In *Ralph W. Harbison,* 26 B. T. A. 896 (reversed on another point in *Harbison* v. *Commissioner,* 68 Fed. (2d) 1004), on facts not materially different from those in the instant case, we held, after reviewing the legislative history of section 113 (a) (5) of the 1926 Act and the decision of the Supreme Court in *Brewster* v. *Gage,* 280 U. S. 327, that the time of distribution to the taxpayers and therefore the basic valuation date under the statute was the date on which the property was distributed to them upon the termination of the testamentary trust created by the will of their father and not the March 1, 1913, value as the Commissioner contended. To the same effect is *Arthur E. Braun, Trustee,* 29 B. T. A. 1161; *Harwood Robbins,* 33 B. T. A. 880; *Robert A. Taft, Trustee,* 34 B. T. A. 603; affd., *Commissioner* v. *Taft* (C. C. A., 6th Cir.), ... Fed. (2d) ....., decided January 10, 1939; *Margaret E. B. Fleming,* 36 B. T. A. 773; *Haskell* v. *Commissioner,* 78 Fed. (2d) 869; certiorari denied, 296 U. S. 652; *Van Nostrand* v. *United States,* 18 F. Supp. 295; affd., 94 Fed. (2d) 510; *Commissioner* v. *Libbey* (C. C. A., 1st Cir.), ... Fed. (2d) ....., decided December 28, 1938. In *Harwood Robbins, supra,* we said:

> The phrase "the time of the distribution" as used in the 1928 Act must necessarily relate to the time at which the property is actually delivered to or made available for the use of the distributee or someone acting for him by the executors, administrators, or others having lawful possession or control thereof. * * *

In *Commissioner* v. *Libbey, supra,* the court held that the basis for computing gain or loss on the sale in 1932 of shares of stock distributed to the taxpayer in 1921, by trustees of her father's estate, was the value of the shares of stock at the time of the actual distribution to the taxpayer in 1921. Respondent states in his brief in these proceedings that the Libbey case is not distinguishable from the case at bar.

Upon authority of the cited cases we hold that the time of the distribution to the taxpayers of the property which they acquired from the residuary trust estate created by the will of their father was the time at which it was distributed to them by the testamentary trustees upon termination of the trust estate on March 29, 1923. The contentions of the petitioners on this issue are therefore sustained and the tax liabilities as to petitioner's gain on the sale of these assets will be redetermined in accordance with the stipulation as to the value of such assets on the basic date.

DECISION.

Pursuant to the Memorandum Findings of Fact and Opinion of the Board entered February 28, 1939, the respondent herein having on March 21, 1939, filed a recomputation and the petitioner having on March 27, 1939, filed an acquiescence therein, now therefore, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1930 in the amount of $46,443.60.

Enter:

(Signed) CHARLES P. SMITH,
Member.

Entered Mar. 29, 1939.

Commissioner of Internal Revenue v. *Maguire, et ux.*

No. 7049.

CIRCUIT COURT OF APPEALS.

Seventh Circuit.

March 5, 1940.

Rehearing denied May 21, 1940.

Before EVANS, MAJOR, and KERNER, *Circuit Judges.*
KERNER, *Circuit Judge.*

This is a petition to review an order of the Board of Tax Appeals, in a proceeding for determination of an alleged deficiency in respondent's income tax for the calendar year 1930. The Commissioner of Internal Revenue had asserted a deficiency of $71,429.62. The Board on March 29, 1939 entered its order finding a deficiency in the amount of $46,443.60.

Gustavus Swift, a resident of Illinois, died on March 29, 1903. He left surviving him his widow and nine children, one of whom, Ruth S. Maguire, and her husband are the respondents herein. He left a will which was duly admitted to probate in the Probate Court of Cook County, Illinois, on May 2, 1903, in which he devised and bequeathed to his executors and trustees in trust his residuary estate, to hold the same and to pay certain payments annually commencing with the date of his death and continuing until the final distribution of his estate.

By clause 8 of his will the trustees were directed to distribute the corpus not less than ten nor more than twenty years after his death among his widow and children in certain specified proportions.

On December 11, 1905 the Probate Court of Cook County entered an order approving the final account of and discharging the executors, and directed them to turn over to themselves as trustees the balance of the estate in accordance with the provisions of the will. Thereafter, the trustees continued to administer the estate as such trustees until March 29, 1923, when the securities received by the trustees, together with other securities subsequently purchased by them, were distributed in kind to the respondent Ruth S. Maguire. Thereafter in 1929 and 1930 certain of the securities were sold.

The taxing statute provides that in the case of property *acquired after 1913* the basis for determining gain or loss is cost. § 113(a), Revenue Act of 1928, c. 852, 45 Stat. 818, 26 U. S. C. A. Int. Rev. Code, page 380. However, as to real property passing by will and personal property specifically bequeathed, the basis is the value of the property at the death of the testator; except that as to personal property passing by general bequest, the basis is the "value of the property at the time of the distribution to the taxpayer." § 113(a) (5).

The taxing statute also provides that in the case of property *acquired before 1913* the basis is cost or 1913 value, whichever is greater. § 113(b). However, as to real property passing by will and personal property specifically bequeathed, the basis is value at death or 1913 value, whichever is greater; except that as to personal property passing by general bequest, the basis is value at distribution to the taxpayer or 1913 value, whichever greater. § 113(b).

In the instant case the property in question was personal property, consisting of shares of capital stock of certain corporations, certain accounts and notes receivable. Some passed under the will by general bequest, and was distributed by the executors to the testamentary trustees in 1905. Some property was purchased by the trustees between 1905 and 1913, and some was purchased between 1913 and 1923. In 1923 the testamentary trustees delivered the properties to the taxpayer.

The taxpayer reasons that the property in question was property acquired by will, and therefore the basis is its value at the time of distribution to the taxpayer. In this regard she contends that although some of the property was purchased by the testamentary trustees, it nevertheless was acquired under and pursuant to the will.[1] On the other hand, the Government argues that the property subsequently purchased by the trustees was acquired by purchase. As to this property the Government contends that the basis is its cost to the trustees.[2]

This court must answer two questions in this case: (1) To what does the language "distribution to the taxpayer" refer—distribution by the estate or delivery by the trust? (2) What is the proper basis of the properties received by the taxpayer? In this connection the Board of Tax Appeals agreed with the taxpayer's position, and decided that the basis was the value of the properties in 1923, at which time there was "distribution to the taxpayer."

The controversy here is over the proper construction of a section of the 1928 revenue statute to the effect that in the case of personal property passing by general be-

1. Taxpayer claims that the date of acquisition, *i. e.*, before or after 1913, is immaterial in the instant case. In saying this, taxpayer proceeds on the theory that no matter when the property was acquired, the property being acquired by virtue of the will takes the basis given for property passing by will, and in this case the following occurs: if the property was acquired after 1913, the basis is the value at time of distribution (claimed to be the year 1923 when the property was delivered to the taxpayer), § 113(a)(5); if acquired before 1913, the basis is still the 1923 value (because greater than 1913 value), § 113(b). Even if the Government agreed as to the point on acquisition, it disagrees as to the date when there is distribution to the taxpayer, claiming the date to be the year 1905 when the estate was closed.

2. In greater detail the Government's contention is as follows. As to property purchased between 1905 and 1913, § 113(b) applies: the basis is cost or 1913 value whichever greater. As to property purchased between 1913 and 1923, § 113 (a) applies: the basis is cost. As to these properties, each is acquired by the taxpayer in the year the trustees purchased it, and the cost in each instance is the cost to the trustees in the year of purchase.

quest, the basis is the "value of the property at the time of the distribution to the taxpayer." The term "distribution" might refer to distribution by the estate. *Jenkins* v. *Smith,* D. C., 21 F. Supp. 433; *Dissenting opinion, Commisisoner* v. *Libbey,* 1 Cir., 100 F. 2d 458. Or it might refer to delivery by the testamentary trust. *Harbison* v. *Commissioner,* 26 B. T. A. 896; *Libbey* case, *supra.*

In the light of the conflict of thought on this point, we are not convinced that the express language of the statute is unambiguous and definite, as counsel for taxpayer would have us believe. Every statute is to be construed with reference to its intended scope and to the purpose of the legislature in enacting it; and where language is used which admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute, being mindful, however, that it is not permissible under the pretense of interpretation to make a law, either by extension or restriction, which shall depart from the legislative intent. In such a situation, resort to aids outside the language itself is necessary. *Brown* v. *Duchesne,* 60 U. S. 183, 194; *Helvering* v. *New York Trust Co.,* 292 U. S. 455, 464; *Helvering* v. *Morgan's Inc.,* 293 U. S. 121, 126. For instance, often one finds the answer to the controversy in legislative history.

Legislative History. The 1921 to 1926 Acts provided that the basis of property passing by will was its value at the time of such "acquisition." Considerable difficulty was experienced in determining the date of acquisition, particularly in cases where the property was sold by the estate of the decedent. See *Bankers' Trust Co.* v. *Bowers,* D. C., 23 F. 2d 941; cf. *McKinney* v. *U. S.,* 62 Ct. Cl. 180. So the language was changed, and as changed incorporated in the 1928 Act. In this connection the legislative comments are pertinent.

The House bill provided that the basis of property passing by will should be its value at the death of the testator, since the "value on the date of death affords an equitable and more readily determinable basis." Ways and Means Committee Report, No. 2, 70th Cong., 1st Sess., p. 18 (1928 Act). The House bill thereby disposed of the confusion caused by the McKinney case, *supra,* by supplying the value-at-death basis to sales of property by the estate, the same basis as used where the property is sold by the beneficiary.

The Senate, however, deemed the House bill weak in one respect, in that it failed to take care of the situation where "the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis * * * for the decedent never owned the property." Finance Committee Report, No. 960, 70th Cong., 1st Sess., p. 26 (1928 Act). Accordingly, the Senate amended the House bill.

As amended, the bill provided that the basis of property passing by will should be value-at-death, except that the basis of personal property passing by general bequest should be the value "at the time of the distribution to the taxpayer." From what has been said, it would appear that Congress was not looking beyond the distribution by the estate. Lending to this appearance is the weight given to the value-at-death rule and the reason given for the exception thereto. It is also easy to conclude that acquisition by the beneficiary was a factor in the minds of the legislators.

We quote again from the legislators: "In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis * * *. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value * * * at the time of distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property * * * transmitted to the beneficiary * * * by general bequest * * *. It would also apply in cases where the executor purchases property and distributes it to the beneficiary." Conference Report, No. 1882, 70th Cong., 1st Sess., p. 14 (1928 Act).

The change in language was incorporated in the 1928 and 1932 Acts, but the difficulty in administering the section continued. Now the difficulty was in the construction of the words "time of distribution." However, in the meantime, the former language "time of acquisition" had been judicially defined to mean "time of death" of the decedent. *Brewster* v. *Gage*, 280 U. S. 327. The reason for the 1928 change existed no longer, and in 1934 Congress reverted to the former language to the effect that

in cases where property is transmitted at death the basis shall be the value at the "time of such acquisition."

Legislative comments in 1934 indicated that the change in the 1934 law was made because the reason for the 1928 language had disappeared and some evils had appeared.[3] Thus, the legislators expressed concern because the existing law permitted situations where an executor-trustee under a will could sell property either before or after distribution to himself as trustee, thereby avoiding taxable gains which accrued between the death of the testator and the distribution by the estate. No concern, however, was expressed over the consequences inherent in situations which would result from considering delivery by the trustee as the "distribution" meant by the tax statute, thereby permitting avoidance of tax gains accruing between death and distribution by the trustee. The inference is strong that Congress was not looking beyond the distribution by the estate, when it wrote the language in controversy. "*Distribution to the Taxpayer.*" As already mentioned, one often finds the meaning of words by reading their origin and purpose. The bare words "distribution to the taxpayer" tell a plain story when placed in their context and defined in the light of their history. In providing the tax basis for property transmitted at death, Congress did not intend the valuation date to go beyond the time when the estate was closed. The phrase relates to the time when the property is distributed by the executor.

Nor is logic offended by our construction. That

3. We quote material parts from the 1934 legislative reports:

"Thus, where a trustee acquires personal property by general bequest, the basis of the property, on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of decedent's death.

"Often times, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other * * *. The trustee, of course, may use a later basis than the executor, and where it is desired to sell * * * the executor-trustee may determine whether it would be most advantageous to sell as executor or trustee. Where the personal property has increased in value * * * the property may be distributed to the trustee, who may use the higher basis * * * thereby diminishing the taxable increment * * *." Finance Committee Report, Senate, No. 558, 73rd Cong., 2nd Sess., pp. 34-35 (1934 Act).

The same committee added that the 1934 change made it "clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis * * * is the fair market value at the death of decedent, which is the same basis adopted * * * when the property is sold by the beneficiary."

the distribution by the estate be to a trustee for the use of the taxpayer in some cases, rather than to the taxpayer himself in every case, matters little. As a matter of logic, where the taxpayer has a substantially vested equitable ownership at the time of distribution to the trustee, then distribution to the trustee is distribution to the taxpayer. The subsequent delivery by the trustee to the taxpayer merely transfers the legal title. *Croxall's Lessee* v. *Sherrerd,* 72 U. S. 268, 281; *Merchants' Loan & Trust Co.* v. *Patterson,* 308 Ill. 519.

We conclude, therefore, that the phrase "time of distribution to the taxpayer" as used in § 113(a) (5) of the 1928 Act means time of distribution by the decedent's estate, and it follows consequently that the time of such distribution in the instant case was December 11, 1905. Moreover, the basis of the property coming to the taxpayer from the executors, through the testamentary trustees, is the 1905 value or the 1913 value of such property, which ever was greater. § 113 (b).

Basis of Property Purchased by Trustees. In the instant case the property in question consists of property transmitted at death and of property subsequently purchased by the trustees under powers given in the will. The taxpayer contends that although some of the property was purchased by the trustees, nevertheless she acquired the properties by will, and therefore the properties take the basis as given in § 113(a) (5). *Fleming* v. *Commissioner,* 36 B. T. A. 773, 777; see footnote 1.

That the taxpayer's right in the properties has its source in the provisions of the will, is certain; but certain too are we that this factor does not control the application of the basis section, § 113(a) (b). For our conclusion we depend considerably on the history that has been related above. It is plain therefrom that the legislators distinguished between specific property owned by the decedent and specific property purchased after decedent's death by the trustee. And they also deemed important the time when these properties were acquired.

For our conclusion we also depend considerably on the statutory scheme. In general the statute applies a cost basis to property acquired by the taxpayer.[4] To some

4. A more accurate statement would mention that as to property acquired before 1913, the basis is cost or 1913 value, whichever greater, § 113(b).

situations the statute applies a different basis, *e. g.*, § 113(a) (5). For instance, in the instant case, the statute makes an exception to the cost basis. This exception, however, applies only to "property transmitted at death." To us this means that the exception, *i. e.*, the value-at-death and value-at-distribution basis, is confined to the specific property owned by the testator at his death.

We conclude, therefore, that property purchased by the trustees is not "property transmitted at death," and that as to it the basis is as described in footnote No. 2. In this connection we may add the following explanation. Where the identical property distributed to the trustees is later delivered to the taxpayer in kind, it may be said that under the statute the taxpayer acquired the property "by will." However, where the trustees buy different property after the distribution, and this property is delivered to the taxpayer, it may be said that it was acquired by purchase and not "by will."

The order of the Board of Tax Appeals is reversed, and the case remanded for further proceedings not inconsistent with the views herein expressed. It is so ordered.

Reversed and remanded.